BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 43**

and

**MEYER MATERIAL COMPANY**

Case 2
No. 59506
A-5902

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jonathan M. Conti**, on behalf of the Union.

**Attorney Louis W. Brydges**, **Jr**., on behalf of the Company.

## ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Racine, Wisconsin, on January 23, 2001. The hearing was not transcribed and the parties thereafter filed briefs that were received by March 20, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

## ISSUE

The parties have agreed to the following issue:

Whether employees formerly employed by LaFarge/Tews should be dovetailed or endtailed for seniority purposes onto the Company's driver seniority list.

## BACKGROUND

The Company operates a redi-mix plant in Kenosha, Wisconsin.

The Company on December 15, 2000, (unless otherwise stated, all dates herein refer to 1999), purchased certain assets from LaFarge/Tews ("LaFarge"), which closed down its Kenosha operations on or about November 30. Those purchased assets included about twelve trucks, one dump truck, one front end loader, one pick-up truck, and four acres of land which formerly housed LaFarge's plant and washout unit. The Company did not purchase any receivables, inventories, or stock, and it did not assume any of LaFarge's contracts. It did, however, finish a job originally started by LaFarge.

LaFarge is an international construction company which has about six remaining plants in Wisconsin, none of which were involved in the asset sale to the Company. It sent the following letter to its Kenosha employees, who also were represented by the Union at that time, on October 25:

. . .

> It is with regret that today the Wisconsin Division of LaFarge Construction Materials announced the closure of the Kenosha readymix plant, effective November 30, 2000. This decision reflects the unfavorable market structure in the Kenosha area that has led to continuing poor historical financial results. While the company has taken action to mitigate this poor performance, the Kenosha market conditions prevent the company from achieving profitability at this location.
>
> I would like to stress that this decision was difficult and in no way reflects upon the performance of the employees at Kenosha, whose commitment, dedication and hard work has been greatly valued by all in the organization.
>
> Along with recent disposals of the Columbus and Watertown readymix sites, this action is part of a strategy to reposition the readymix business in more favorable market areas. I would further emphasize that the company has an ongoing commitment to the Milwaukee area and is currently reviewing several opportunities to strengthen its position in the Metro Milwaukee readymix market. In connection with our commitment to readymix, we are also currently in negotiations with a third party to expand and strengthen the Division's sand and gravel aggregate business.
>
> In conclusion, the closure of our Kenosha site was not an easy one and the company is actively seeking to minimize any negative impact this decision may have on our employees and their families.

. . .

The Company on December 1 began to accept applications from the former LaFarge truck drivers and it hired eight of them by January 11, 2001. All eight retained the prior contractual wage rates they had received at LaFarge and they also retained their prior health and welfare benefits. The Company endtailed all eight at the bottom of the seniority list because they had no prior service with the Company. Since some of the former LaFarge drivers have more seniority than the Company's drivers, the former would move up to near the top of the seniority list if they were dovetailed. The Union on December 21 grieved the Company's actions by claiming that all eight LaFarge should have been dovetailed rather than endtailed (Joint Exhibit 5). The parties thereafter agreed to immediately submit the grievance to arbitration.

Article 5 of the parties' contract, entitled "Transfer of Company Title or Interest", states:

> **Section 1.** This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assignees. In the event an entire operation, or any part thereof is sold, leased, transferred or taken away by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement, or any part thereof. Such notice shall be in writing, with a copy to the Union, not later than the effective date of sale. Nothing in this Agreement shall be construed to prevent the Employer from terminating all or part of his business, following prior notice to the Union.
>
> **Section 2.** Acquisition, Purchase or Merger. When two (2) companies merge their operations, then the employees of the respective companies shall all be placed on one (1) seniority roster in order of the earliest date of hire of the employees with their respective Employer.

Article 5 of the contract between the Union and LaFarge, entitled "Transfer of Company Title or Interest", contained the almost identical language. It stated:

> **Section 1.** This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or any part thereof is sold, leased, transferred or taken away by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of the

> Agreement for the life thereof. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement, or any part thereof. Such notice shall be in writing with a copy to the Union not later than the effective date of sale. Nothing in this Agreement shall be construed to prevent the Employer from terminating all or part of his business, following prior notice to the Union.
>
> **Section 2.** Acquisition, Purchase or Merger. When two or more companies merge their operations, then the employees of the respective companies shall all be placed on one seniority roster in order of the earliest date of hire of the employees with their respective Employer.

## POSITIONS OF THE PARTIES

The Union maintains that the Company under both Article 5 of the LaFarge contract and Article 5 of the Company's contract here is required to dovetail the former LaFarge drivers onto the Company's seniority list and that the parties' contract here "may not be ignored in favor of an allegedly more equitable method."

The Company contends that the parties' contract here "mandates endtailing onto the seniority list the former LaFarge/Tews drivers hired by the Company." It also asserts that the LaFarge contract is inapplicable and that "arbitrable precedent supports endtailing even in situations deemed a merger of operations."

## DISCUSSION

The Union asserts that dovetailing is required under Article 5 of the parties' contract which is set forth above. Section 1 therein, however, is only applicable when there is a "Transfer of Company Title of Interest" and when all or part of the Company's operations are taken over which, of course, is not the case here.

Section 2 therein is applicable only when there has been a merger between two companies and only when their operations are merged. Here, though, all that occurred is the purchase of some of LaFarge's assets – after LaFarge totally ceased its Kenosha operations. Given LaFarge's size as one of the biggest construction companies in the world with operations in about 63 different countries, there is no merit to any claim that it has "merged" with the Company. Moreover, and even though the Company finished a project that was started by LaFarge, there has been no merger of operations since LaFarge's Kenosha operations ceased to exist and since the Company did not purchase any of LaFarge's receivables, inventories, or stock, and did not assume any of LaFarge's customer contracts.

As for LaFarge's contract with the Union, Article 5, Section 1, therein is applicable to LaFarge's "successors, administrators, executors, and assigns." The Company does not constitute any such entity. In addition, Section 2 therein limits its coverage to "When two or more companies merge their operations. . ." which again is not the case here for the reasons just stated.

The unique situation here – where there has been no merger of operations and where LaFarge totally closed down its Kenosha operation before selling off pieces of equipment to the Company – therefore is not covered under either the parties' contract or the LaFarge contract.

In this connection, the Company cites NEVADA READY-MIX AND TEAMSTERS LOCAL 631, 93 LA 1232 (1989), where arbitrator Frederick R. Horowitz ruled that the newly-hired ready-mix drivers who formerly worked for an employer which sold some of its assets to their employer were to be endtailed rather than dovetailed.

In doing so, Arbitrator Horowitz found that the parties' contract defined seniority as "the longest continuous time of service in the employment of the particular employer. . ."; that the employer had refused to assume either the other company's contract with the union or that company's drivers; that the employer there was not a successor to the other company's contract; that the employees from that company had been properly endtailed; and that the claimed equities on behalf of the new employees could not be considered because the contract measured seniority by "the longest continuous time of service in the employment of the particular employer. . ."

The Union asserts that "the reasoning behind Horowitz's decision actually supports the Union's position. . ." because the seniority provision there referred to time "in the employment of the particular employer", thereby referencing "the only employer party to the collective bargaining agreement". Here, states the Union, Article 5, Section 2, of the parties' contract refers to "the earliest date of hire of the employees with their respective Employer," thereby establishing that seniority is not restricted to "time worked with Meyer. . ."

That certainly is true for situations involving mergers under that contract language. But here, there has been no merger of operations, which is why that part of the contract is not controlling.

Instead, this situation is governed by Article 4, Section 2, of the parties' contract which states:

> **Section 2.** The term "master seniority" means length of service with the Employer while the employee is performing the work in the collective bargaining unit covered by this Agreement. The term "yard" (which shall mean yard, plant or terminal) seniority means length of service with the Employer while the employee is performing work in the collective bargaining unit covered by this Agreement at the particular yard.

This language is dispositive because seniority here is measured by the length of service "covered by this Agreement" and "in the collective bargaining unit covered by this Agreement at the particular yard." As a result, the seniority date of the former LaFarge employees must be measured by how long they have been in this bargaining unit, which is why they must be endtailed, rather than dovetailed.

Lastly, the Union cites *How Arbitration Works*, Elkouri and Elkouri (BNA, 5th Ed., 1997), at 833; BURNSIDE-GRAHAM READY-MIX, 86 LA, 972 (Wren, 1986); and UNION SPRING & MFG. CO., 46 LA 589 (Wagner, 1966), in support of its claim that "the use of 'length of service' for determining seniority. . ." is a recognized "equitable solution."

In BURNSIDE, Arbitrator Harold G. Wren ruled that dovetailing was proper under a Joint Venture agreement between two companies that merged. Here, by contrast, there is no joint venture agreement or merger. In UNION SPRING, Arbitrator Robert J. Wagner ruled that dovetailing was proper because the company had agreed to assume the union's contract with the other company; because all of the employees at the company's plant were to be transferred to the newly-purchased plant; and because the arbitration submission expressly stated that the arbitrator "shall consider the equities involved and shall apply equitable considerations." Id., at 595-596. If all those factors existed here, I would sustain the grievance for all the reasons set forth by Arbitrator Wagner. But here, the Company has not agreed to assume LaFarge's contract with the Union; the Company's employees are not being moved to LaFarge's former operation; and the answer here must be based on contract language, rather than any "equitable considerations." In addition, the principles cited in *How Arbitration Works* are inapplicable here because there has been no merger or consolidation.

Based on the above, it is my

## AWARD

1. That employees formerly employed by LaFarge/Tews must be endtailed for seniority purposes onto the Company's driver seniority list.

2. The grievance is hereby denied.

Dated at Madison, Wisconsin this 19th day of April, 2001.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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